The Expanding Scope of the Rule of Law in the International Sphere

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Abstract

International Law has been traditionally understood as including within its fold two distinct subfields: Public International Law and Private International Law. Public International Law refers to the law that governs relations between nation-states. Private International Law refers to the branch of law that governs legal questions of an international nature concerning individuals and corporate and other non-state entities. The "realists" of International Relations Theory denied the efficacy of Public International Law on the grounds that it lacked a mechanism for the enforcement of its tenets. In response to this criticism, the adherents of the "New Haven School" of International Law chose to study the processes whereby international law comes to have validity and legitimacy even in the absence of an effective machinery for its enforcement. The advent of globalization has brought in its wake a surge of transnational interaction among individuals, nation-states, and corporate and other non-state entities. With this the nature of international law is becoming considerably more complex. The use of the phrase "rule of law" is expanding from its traditional base in the domestic sphere and spreading into the international sphere. In recent years, it has been given an imprimatur in communiqués and declarations issued in various international forums. As such, the concept of the rule of law now traverses the areas customarily covered by several disciplines, principally international law, international relations theory, and constitutional law. This paper briefly notes the essential ideas in the three areas that are necessary for an understanding of this subject. It then goes on to explain how the opinions of the United States Supreme Court, and the propensity of the Justices of the Court to partake in the "Transnational Judicial Dialogue" can have a direct bearing upon the expansion of the rule of law in the international sphere. This paper avers that for this reason, the recent vacancy caused on the United States Supreme Court by the retirement of one of the Justices and the appointment of a new

Justice to fill the vacancy involves issues beyond the customary liberal and conservative divide. It is a matter of interest not only from the viewpoint of domestic U.S. Constitutional law, but also from that of International Law and International Relations theory.

> *The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*[1]
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> – Oliver Wendell Holmes, *The Common Law.*

Ⅰ. INTRODUCTION

The concept of the rule of law has an appealing ring to it and it resonates with people in nations around the world. Though it often means different things to different people, it usually revolves around a few core principles: equality before the law, procedural and substantive fairness, and freedom from arbitrary power. Nations around the world commonly avow their acceptance of and adherence to the principles associated with the rule of law. The advent of globalization has brought in its wake a surge transnational interaction among individuals, governmental authorities, and corporate and other non-state entities. Consequently, the use of the phrase "rule of law" is spreading from its traditional zone in the domestic sphere and is now being increasingly used in the international sphere. This is manifested by its use in a plethora of communiqués and declarations issued in international forums. For this reason, the concept of the rule of law now traverses the areas conventionally covered by a host of disciplines. The principal ones among them are international law, international relations theory, and constitutional law.

International Law has been traditionally understood as including within its fold two distinct subfields: Private International Law and Public International Law. Private International Law is often referred to in common law jurisdictions as Conflict of Laws, because it deals principally with legal questions relating to jurisdiction and choice of law in cases involving a foreign element between individuals and non-state entities. Public International Law, which is more commonly referred to as International

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[1] Oliver Wendell Holmes, *The Common Law*, Lecture 1 [1881] (Mark De Wolfe Howe ed., Harvard University Press, 1967).

Law refers to the law that governs relations between nation-states. The "realists" of International Relations Theory denied the efficacy of International Law on the grounds that it lacked a mechanism for the enforcement of its tenets. In response to this criticism, the adherents of the "New Haven School" of International Law chose to study the processes whereby international law comes to have validity and legitimacy even in the absence of an effective machinery for its enforcement. The advent of globalization has brought in its wake a surge of transnational interaction among individuals, nation-states, and corporate and other non-state entities. With this the nature of international law is becoming considerably more complex.

This paper briefly sets out the core ideas that are necessary for an understanding of the subject-matter of this paper. It then goes on to explain how the composition of the Justices on the U.S. Supreme Court can have a bearing upon the expansion of the rule of law in the international sphere. The paper avers that the appointment of a new Justice to fill the vacancy caused by the retirement of one of the Justices on the U.S. Supreme Court involves important questions that go beyond the usual liberal and conservative issues. The appointment of a new Justice on the U.S. Supreme Court is a matter of great interest not merely from the viewpoint of domestic U.S. Constitutional law but also from the perspective of International Relations Theory and International Law.

Part II of this paper explains the core principles encapsulated by the expression "rule of law" in the conventional understanding of the phrase.

Part III of the paper sets out very briefly a few essential concepts relating to international relations theory and international law. This part describes the three customary constructs of realism, liberalism, and constructivism that are used for a descriptive or normative understanding of international relations. This part also sets out the traditional understanding of international law and how it was changed by the criticism that it was subjected to by the realists of international relations theory. The response of the "New Haven School" to the skepticism of the realists is briefly explained, and so also are the new developments relating to Transnational Legal Process and the transmission of international norms, Transgovernmental Network Theory, the advent of the "New" New Haven School of International Law, the application of rational choice theory to international law, and the recently growing phenomenon of the "Transnational Judicial Dialogue."

Part IV explains the use of foreign sources of law by the U.S. Supreme Court to

decide cases relating to domestic U.S. Constitutional law. It explains the influence of U.S. Constitutional law on the constitutions of countries around the world, and the recent transnational convergence about the understanding of essential norms of law and governance. This part also seeks to explain the bearing that the opinions of the U.S. Supreme Court can have on the transmission of norms in the international sphere and its consequent effect on transnational law.

Finally, the conclusion avers that the appointment of a new Justice on the U.S. Supreme Court is a matter of interest not only to those interested in domestic American issues, but also to those that deal with matters relating to international law and international relations, and to jurists in other countries who are interested in seeing the international expansion of the rule of law.

Ⅱ. THE RULE OF LAW

The expression "rule of law" encompasses a concept of elastic ambit and means various things to various people.[2]

It is an expression that is commonly invoked in international forums. For example, at the 2005 World Summit in the 60th session of the United Nations General Assembly, the states expressly recognized "the need for universal adherence to and implementation of the rule of law at both the national and international level," and postulated the establishment of a special unit within the Secretariat specifically designed to promote the rule of law.[3]

So also, at the 2007 meeting of the Foreign Ministers of the G8, the communiqué declared that the member nations were committed to the "rule of law" and that it was the basis "on which we build our partnership and our efforts to promote lasting peace, security, democracy and human rights as well as sustainable development worldwide."[4]

The first prominent exposition of the idea of the "rule of law" was put forward by the British jurist Albert Venn Dicey in his work *Introduction to the Study of the Law of the*

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[2] *See generally*, Ronald A. Cass, *The Rule of Law in America* 1 (The Johns Hopkins University Press, 2002); David M. Beatty, *The Ultimate Rule of Law* 1-35 (Oxford University Press, 2005).

[3] *United Nations, World Summit Outcome, General Assembly Resolution 60/1 (2005)*, www.un.org/summit2005/.

[4] *Declaration of G8 Foreign Ministers on the Rule of Law (2007)*, http://www.g8.utoronto.ca/foreign/formin070530-law.pdf.

Constitution.[5] According to Dicey, the expression "rule of law" encapsulates three essential principles: Firstly, it requires that all official actions be subject to the declared law of the land; secondly, it requires that everybody should be treated equally before the law; and thirdly, it requires the judicial recognition of individual rights.[6]

Lon Fuller has also formulated his own version of the rule of law. Fuller's version requires a coherent framework of lucid, practical, consistent, non-retroactive rules that have been published and are adhered to by official agencies of the state.[7]

The rule of law brings about a plethora of benefits. It promotes certainty, predictability, and security; it curtails the arbitrary actions of state authorities; and it brings about social order. These, in turn, serve to foster social and economic development.[8]

The Organization for Economic Cooperation and Development has recognized that "the concept first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability."[9]

Ⅲ. INTERNATIONAL AND TRANSNATIONAL LAW

The field of International Law is by no means a monolithic entity. The details and interstices of the subject are fraught with contentious issues that serve as battlegrounds for contending schools of thought. The more prominent among these are Legal Positivism, the New Haven School of International Law, Transnational Legal Process, and the interplay between International Law and International Relations Theory.[10] One prominent feature of the onset of globalization has been the

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5 A.V.Dicey, *Introduction to the Study of the Law of the Constitution* [1881] (10th edition, Macmillan, 1961).

6 *See generally,* J.Rose, *The Rule of Law in the Western World: An Overview*, 35 Journal of Social Philosophy 457 (2004); J. Stapleton, *Dicey and his Legacy*, 16 History of Political Thought 234 (1995).

7 Lon Fuller, *The Morality of Law*, 2nd ed. (Yale University Press, 1969).

8 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press,2004).

9 *OECD Development Assistance Committee, Issues Brief : Equal Access to Justice and the Rule of Law* 2 (2005), http://www.oecd.org/dataoecd/26/51/35785471.pdf.

10 *See, e.g.*, W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application,* in Rudiger Wolfrum and Volker Roben (editors), *Developments of International Law in Treaty Making 26* (Springer, 2005).

transformation of the perception of the international sphere from being one of a community of nations to one which also encompasses a worldwide community of individuals and other non-state entities.[11] This has led to the preference among some to use the term "transnational law" in place of "international law."[12]

A. The Traditional Understanding of International Law:

In the traditional understanding, International Law includes within its fold the sub-fields of Private International Law and Public International Law. In many common law jurisdictions, Private International Law is referred to as Conflict of Laws because it deals principally with deciding jurisdictional and choice of law issues in cases that involve a foreign element. Public International Law, often referred to simply as International Law concerns that body of law and principles that govern the relations between nation-states in accordance with the rules embodied in customs– referred to as customary international law[13]– or treaty-based rules.[14]

The Statute of the International Court of Justice[15] enumerates the sources of international law thus:

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[11] *See generally*, Heba Shams, *Law in the Context of "Globalization": A Framework of Analysis*, 35 International Lawyer 1589 (2001); David Held and Anthony McGrew, editors, *The Global Transformations Reader: An Introduction to the Globalization Debate, 2nd edition* (Polity, 2003); Charles Jones, *Global Justice : Defending Cosmopolitanism* (Oxford University Press, 2001).

[12] *See e.g.*, Samuel P.Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 American Journal of Comparative Law (2007); P.R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law,* 44 *Stanford Journal of International Law* (2008).; Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law,* 37 Columbia Human Rights Law Review (2005).

[13] *See* Ian Brownlie, *Principles of Public International Law* 6-12 (7thed., Oxford University Press, 2008).

[14] *See* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law,* 71 University of Chicago Law Review 469 (2005).

[15] Section 92 of the *Charter of the United Nations* describes the International Court of Justice as "the principal judicial organ of the United Nations." Under article 34 (1) of the *Statute of the International Court of Justice*, "Only states may be parties in cases before the Court."

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. [16]

One evident feature of the traditional understanding of international law was that it focused on the acts of nation-states.[17]

In recent years, many scholars have preferred to use the term "transnational law" in place of "international law" to highlight the fact that what is at issue is not merely law that concerns nation-states but also that which encompasses a broad array of non-state actors. According to Oona Hathaway, "[Transnational] means across nations, as opposed to 'international' which means between nations. … When applied to law, for example, transnational law includes all law that has cross-border effect, whereas international law refers only to treaties or other law that governs interactions between states."[18]

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[16] *Article 38 (1), Statute of the International Court of Justice, 1 U.N.T.S. xvi.* Normative issues relating to international law are also addressed in a plethora of conventions, such as the *Vienna Convention on the Law of Treaties,* 1155 U.N.T.S. 331, and the *International Covenant on Economic, Social and Cultural Rights,* 993 U.N.T.S. 3.

[17] *The Restatement (Third) of Foreign Relations* (1986) defines customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation [opinio juris]."

[18] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 University of Chicago Law Review 469, 473 n.11 (2005). Another definition of transnational law is that provided by Harold Hongju Koh:

> Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is "downloaded" from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law…, (2) law that is "uploaded, then downloaded":for example, a rule that originates in a domestic legal system…. and (3) law that is borrowed or 'horizontally transplanted' from one national system to another….

Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn State International Law Rev. 745, 745(2006).

B. International Relations Theory:

To gain a perspective on the nature of international law, it would be useful to briefly delineate the principal schools of international relations theory: "realism," "liberalism," and "constructivism."[19]

(1) Realism: "Realism" was a school of thought that was spawned contemporaneously with the advent of the Cold War. Its principal proponents were Hans Morgenthau and George Kennan.[20] The realists emphasized the centrality of state power and state interests as the controlling factors which guided and shaped state behavior in international matters. Morgenthau contended that "[i]nternational law owes its existence to identical or complementary interests of states, backed by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law."[21] Morgenthau was especially emphatic in pointing out the absence of an effective machinery for the enforcement of much of what was traditionally understood to be the canons of international law. The realism of the International Relations theorists had an effect on international law scholarship inasmuch as the customary Austinian Positivist efforts to discover what the "law" truly was seemed ineffectual to meet the realist challenge.[22]

(2) Liberalism: In contrast to realism, which makes no distinction between states regarding their internal politics, liberalism holds that international harmony in political, social, and economic matters is fostered by the promotion of democracy and the rule of law among the sovereign states of the world.[23] Liberalism

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[19] For efforts to make an interplay of the ideas from the two disciplines, *see* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers,* 14 Yale Journal of International Law 335 (1989); Michael Reisman, *A Theory About Law from the Policy Perspective*, in David N. Weisstub, editor, *Law and Policy* (Osgoode Hall Law School, York University 1976).

[20] *See e.g.*, George F. Kennan, *American Diplomacy 1900-1950* (University of Chicago Press, 1985); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (5th ed., Alfred A. Knopf, 1978).

[21] Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 American Journal of International Law 260 (1940).

[22] For an account of Positivism in International Law, *see* Hans Kelsen and Robert W. Tucker, *Principles of International Law* 438-39 (Holt, R & W, 1966).

[23] Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 Philosophy and Public Affairs 205, 213 (1983).

considers an independent judiciary to be a sine qua non for the rule of law.[24]

(3) Constructivism: Like liberalism, constructivism is founded upon a commitment to certain essential ethical values. In the view of constructivists, the conduct of states and individuals is influenced by the consensus that evolves when there is a transnational dialogue regarding core values among activist intellectuals in various states.[25]

C. The "New Haven School" of International Law:

Myres S. McDougal and Harold D. Lasswell—both faculty members at the Yale Law School—were the founders of what came to be called the New Haven School of International Law.[26] The term that they themselves used to describe the ideas that they propounded was "Policy-Oriented Jurisprudence."[27] The impetus for the New Haven School was the need to respond to the skepticism about the efficacy of international law that was espoused by the "realists" of international relations theory, whose ideas held great sway in the cold war era.

The leading scholars of the New Haven School studied legal decision-making as a social process that carried authority.[28] They championed a socio-legal realist approach as opposed to the power-based political realist approach championed by Hans Morgenthau and George Kennan.[29] They emphasized the paramount importance of the legal and political processes that accompanied the formulation of rules in the international sphere in the creation of a "world constitutive process."[30] The New Haven School scholars also sought to highlight the crucial role played by an array of non-state

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[24] Peter H. Russell & David M.O' Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 1 (University of Virginia Press, 2001); F.A. Hayek, *The Constitution of Liberty* 153, 156 (University of Chicago Press, 1960).

[25] *See* Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornel University Press,1998).

[26] *See e.g.,* Myres S. McDougal, *Studies in World Public Order* (Yale University Press, 1960).

[27] *See generally*, Harold D. Lasswell & Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press/Kluwer Law, 1992).

[28] *See, e.g., Symposium, McDougal' s Jurisprudence: Utility, Influence, Controversy*, 79 American Society of International Law Proceedings 266 (1985).

[29] *See, e.g.,* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Virginia Journal of International Law 188 (1968); W. Michael Reisman, *The View From the New Haven School of International Law*, 86 American Society of International Law Proceedings 118 (1992).

[30] Myres S. McDougal, Harold D.Lasswell, and W.Michael Reisman., *The World Constitutive Process of Authoritative Decision*, 19 : 3 Journal of Legal Education 253, 254-255 (1967).

actors in the formulation of rules in the international sphere.[31] They contended that it was not the legislature alone that formulated the law, but that the legal process comprised of "policy content, authority signal and control intention," and that actions and communications among non-state entities which fashioned new paradigms of propriety could correctly be considered as functional lawmaking.[32]

D. Transnational Legal Process and the Transmission of International Norms:

Harold Hongju Koh is a leading proponent of the Transnational Legal Process Movement.[33] Koh explains transnational legal process as a means

> whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.... Instead of focusing exclusively on issues of "horizontal jawboning" at the state-to-state level as traditional international international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of "vertical domestication," whereby international law norms "trickle down" and become incorporated in domestic legal systems.[34]

Koh combined the process-based insights of the scholars of the New Haven School with the insights relating to legal pluralism advocated by Rober Cover to highlight the jurisgenerative power of international law that impelled nations to comply with its norms and principles even in the absence of a manifest coercive mechanism.[35]

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[31] *See generally*, W. Michael Reisman, *Law in Brief Encounters* (Yale University Press, 1999).

[32] W. Michael Reisman, *International Lawmaking: A Process of Communication, The Harold D. Lasswell Memorial Lecture*, (April 24, 1981), reprinted in 75 American Society of International Law Proceedings 101, 103 (1981).

[33] See Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 Yale Law Journal (1997) (book review); Harold Hongju Koh, *Transnational Legal Process*, 75 Nebraska Law Review 181 (1996).

[34] Harold Hongju Koh, *Bringing International Law Home*, 35 Houston Law Rev. 623, 625-26 (1998) (internal citations omitted).

[35] *See generally*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harvard Law Review 4 (1983); *Also see generally* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 29 Sydney Law Review (2007); Manuel Castells, *The Power of Identity, Volume 2* of *The Information Age: Economy, Society and Culture* (2nd ed., Wiley-Blackwell, 2004).

Norms are standards of behavior that are appropriate for specific persons in specific contexts.[36] International norms can be transmitted from international forums to domestic forums and vice versa and in turn can affect and influence the internal laws of a country. Norms compel compliance differently from laws. The violation of a social norm invites social sanction whereas the violation of a law invites state sanction.[37]

In the international context, Lawrence Friedman has classified norms as being of three types: (i) those which are imposed from without; (ii) those which are voluntarily adhered to; and (iii) those which evolve with practice.[38]

The process of establishment of a norm usually goes through three stages. In the first stage, a new norm emerges in an incipient form when a critical mass of key players come to accept the norm. In the second stage, the norm begins to enjoy widespread acceptance. In the final stage, the norm comes to be internalized.[39]

At the international level, Koh has posited that a norm gets transmitted from the international sphere into the national sphere through the process of interaction, interpretation, internalization, and obedience.[40] Koh has pointed out that transnational public law litigation is an amalgam of the two customary forms of litigation: (i) private individuals making claims against other individuals in domestic courts under national laws, and (ii) nation-states raising treaty or custom-based claims against other nation-states in international tribunals.[41] Transnational dispute resolution intensifies the interaction between domestic and international tribunals, and thereby facilitates the transmission of international legal norms. This has generated a new body of scholarship that studies global constitutionalism, that is, the establishment of constitutional structures in areas of transnational intersections.[42]

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[36] *See generally* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 International Organization 887, 891 (1998).

[37] Robert D. Cooter *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 Oregon Law Review. 1, 4-5 (2000).

[38] Lawrence M. Friedman, *Borders:On the Emerging Sociology of Transnational Law*, 35 Stanford Journal of International Law 65, 70 (1996).

[39] Finnemore & Sikkink, *supra* note 36 at 895.

[40] Harold Hongju Koh, *How is International Human Rights Law Enforced?* 74 Indiana Law Journal 1397, 1414 (1999).

[41] Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2348 (1991).

[42] See Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009).

E. Transgovernmental Network Theory:

Closely related to the Transnational Legal Process theory is the Transgovernmental Network Theory.[43] Transgovernmental networks refer to the informal networks that have been created among national regulatory authorities to regulate, negotiate, supervise, and enforce standards and rules relating to international transactions. Two such transgovernmental regulatory networks are the International Organization of Securities Commissions which regulates international securities transactions and the International Competition Network which coordinates the efforts of antitrust authorities. According to this theory, individual government entities act in concert with their counterparts in other countries to reach informal agreements to matters within their zone of responsibility to effectively address the issues that commonly arise.

F. The "New" New Haven School of International Law:

Laura Dickinson has identified a group of scholars who can be meaningfully classified into a category that she terms as a "New" New Haven School of International Law.[44] She identifies the common features of this school as follows:

(i) an inclination to take a normative stance on issues,
(ii) a commitment to the rule of law and accountability,
(iii) support for human rights,
(iv) an expansive understanding of the non-state actors involved in international law in addition to state actors,
(v) a pragmatic examination of the norms and processes of international law in their actual settings rather than the analyses of abstract models,
(vi) the adoption of interdisciplinary and empirical approaches.[45]

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[43] The early beginnings of this theory can be traced back to Robert O. Keohane & Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (1977); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations,* 27 World Politics 39 (1974). *Also see*: Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Virginia Journal of International Law 1 (2002). For a contrary view about the effectiveness of such networks, see Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale Journal of International Law 1 (2009).

[44] Laura Dickinson, *Toward a 'New' New Haven School of International Law*, 32 Yale Journal of International Law 547 (2007).

[45] Laura Dickinson, *Id.*, at 549-551.

G. International Law and Rational Choice Theory:

Professors Jack Goldsmith and Eric Posner are the principal proponents of a school of thought that has sought to use the tenets of Rational Choice Theory to explain the behavior of nation-states in the international sphere. Their arguments have been most fully presented in their book *The Limits of International Law.*[46]

Goldsmith and Posner present arguments that are reminiscent of the "realism" urged by Hans Morgenthau and other International Relations theorists in the Cold War era. In their view, compliance with international law is optional not obligatory and is merely a manifestation of "states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."[47] They seek to justify their stance not only descriptively but normatively as well, for they share the view of other scholars of similar ilk that values the sovereignty of the nation-state above that of any international norms or international authority.[48]

However, rational choice theory has also been invoked to support the notion that rational choice in fact impels nations to comply with international law for the reason

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[46] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005).

[47] Goldsmith and Posner, *id.* at 3. One major criticism of the application of rational choice theory to international law has been advanced by Janet Koven Levit who takes issue with its assumption of international lawmaking as a "top-down" process in which the nation-states are the principal actors.. According to Levit, a large part of modern international lawmaking is a "bottom-up" process that is shaped by

> practitioners — both public and private — who must …
> grapple with the day-to-day technicalities of their trade.
> On the basis of their experiences on the ground, these practitioners
> create, interpret, and enforce their rules. Over time, these initially
> informal rules blossom into law that is just as real and just as effective,
> if not more effective, as the treaties that initiate the top-down processes.

Janet Koven Levit, *A Bottom - Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments,* 30 Yale Journal of International Law 125, 126 (2005). *Also see* Janet Koven Levit, *Bottom - Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 Yale Journal of International Law 393 (2007); Janet Koven Levit, *Bottom - Up Lawmaking through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 58 Emory Law Journal (2007).

[48] *See e.g.*, Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Columbia Law Review 1492 (2004); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 Texas International Law Journal 527 (2003).

that such compliance has a positive bearing upon the nation's reputation in the international sphere.[49]

H. Transnational Judicial Dialogue:

Transnational Judicial Dialogue is the term that is used to describe a growing phenomenon of modern times which entails consequences that are, in a sense, parallel to those entailed by the Transnational Legal Process. Melissa A. Waters describes Transnational Judicial Dialogue as the

> informal networks of domestic courts worldwide, interacting with and engaging each other in a rich and complex dialogue on a wide range of issues [internal footnote omitted]. Transnational judicial dialogue is the engine by which domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms.[50]

According to Melissa Waters the "co-constitutive" process of the Transnational Judicial Dialogue is the means whereby the internal norms of a country are extra-territorially transferred into the international sphere where they enter into and shape the international legal discourse. In turn, the international legal discourse serves to influence and shape the internal norms of the country. When a norm becomes integrated into a critical mass of legal regimes worldwide, there is norm convergence on that particular issue in the international legal domain.[51]

Whereas international legal norms are absorbed from the international domain into the domestic domain through the Transnational Legal Process, Transnational Judicial Dialogue also enables the transference of norms from the domestic domain to the international domain in addition to the reverse process.[52] Thereby, domestic and international courts and international forums enjoy a symbiotic role in the creation of national and international legal norms.

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[49] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press,2008).

[50] See Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Georgetown Law Journal 487, 490 (2005).

[51] Melissa A. Waters, *id.*, at 502-503.

[52] *See generally*, Jenny S. Martinez, *Towards an International Judicial System*, 56 Stanford Law Review 429 (2003).

Especially in the context of issues relating to national constitutions, courts in countries around the world are engaged in a wide-ranging exchange of ideas based on comparative analysis and judicial comity.[53]

Referring to the act of judges looking for guidance to opinions of courts in other countries, a former Justice of the Canadian Supreme Court has stated that

> the process of international influence has changed from reception to dialogue. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring.[54]

Referring to the Transnational Judicial Dialogue as it has been proceeding apace outside courts of law, the description of a conference relating to this issue held by the American Society of International Law and Harvard Law School in December 2006 states as follows:

> In recent decades, a significant number of judges from around the world have engaged in an unprecedented dialogue on issues related to promoting judicial independence, accountability, and efficiency. This dialogue has taken place via meetings of professional associations, intergovernmental organizations and commissions, and other formal networks of judges and legal professionals [internal citation omitted]. In addition, many judges have participated in delegations that visit courts and related institutions, such as law enforcement

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[53] *See generally* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Virginia Law Review 771 (1997). One of the striking features of the recent surge in cross-citations is the absence of any obligation on the part of the courts to do so. *See also* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA Law Review 539 (2001). Anne-Marie Slaughter has referred to these exchanges as "horizontal" and "vertical." Horizontal exchanges are those that take place between courts of equal status in different countries. "Vertical" exchanges are those that take place between courts and supra-national courts. *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. Richmond Law Review 99 (1994). *Also see* Anne-Marie Slaughter, *A New World Order* (Princeton University Press,2005); Anne-Marie Slaughter *Judicial Globalization*, 40 Virginia Journal of International Law 1103 (2003).

[54] Claire L' Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa Law Journal 15, 17 (1998).
With reference to European judicial networks, *see* J.H.H. Weiler, *The Transformation of Europe*, 100 Yale Law Journal 2403 (1991). *See also* Robert Badinter and Stephen Breyer, editors, *Judges in Contemporary Democracy: An International Conversation* (NYU Press, 2004).

> and judicial training centers, to learn more about how legal and judicial systems other than their own operate. Countless others have exchanged know-how and expertise by participating in judicial reform and assistance projects and initiatives to improve judicial cooperation.[55]

The Transnational Judicial Dialogue is an important means whereby the rule of law is being fortified and disseminated in the international domain.

IV. THE UNITED STATES SUPREME COURT AND INTERNATIONAL LAW:

Writing the opinion of the U.S. Supreme Court in the case of *Marbury v. Madison*, Chief Justice Marshall famously stated that "[t]he government of the United States has been emphatically termed a government of laws, and not of men."[56] With that he placed his imprimatur upon the rule of law in the United States.

Under the Supremacy Clause, the paramount law of the United States is that set out in the United States Constitution.[57] Treaties are among those enumerated as constituting the supreme law of the land. Although in the conventional view, treaty-based law and customary international law are equally legitimate sources of international law, some scholars question the validity of customary international law as a source of law for domestic purposes within the United States. [58]

It is now being widely accepted among constitutional scholars that in addition to the written document that was drafted at the Philadelphia Convention in 1787 and the twenty-seven formal amendments, the United States Constitution should be deemed to include landmark judicial precedents, established political practices, and "fundamental documents such as the Declaration of Independence and the Gettysburg Address and,

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[55] *Transnational Judicial Dialogue: Strengthening Networks and Mechanisms for Judicial Consultation and Cooperation,* Conference Organized by the American Society of International Law and Harvard Law School, December 1-2, 2006. Available at http://www.asil.org/files/asilharvardconf.pdf

[56] 5 U.S. (1 Cranch) 137, at 163 (1803).

[57] Article VI of the U.S. Constitution states:

> This Constitution,and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In the case of *The Paquete Habana*, 175 U.S. 677, 700(1900), the U.S. Supreme Court stated: "International Law is part of our law, and must be ascertained by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

[58] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harvard Law Review 815 (1997).

beyond that, aspects of the American experience that cannot be reduced to a text at all."[59]

All the three branches of government, that is, the executive, the legislature, and the judiciary are invested with the authority to interpret the constitution. However, under the doctrine of Judicial Review which was established by the U.S. Supreme Court in *Marbury v. Madison*, the Judiciary is the highest authority in matters of constitutional interpretation.[60] Through the system of checks and balances, the legislature and the executive are invested with the authority to appoint members of the judiciary. Although the ideological leanings of the nominee are often a major point of scrutiny during the nomination process, there have been numerous instances where the judges have departed after their appointment from their hitherto known philosophical propensities.[61]

The U.S. Constitution has had considerable influence on the shaping of constitutional law around the world.[62] One of the dominant features of modern constitutions worldwide is a declared commitment to civil and political rights. [63]

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[59] Sanford Levinson, *Constitutional Faith* 185 (Princeton University Press,1989).

[60] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). Chief Justice Marshall's opinion on behalf of the Court states:

> It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each . . . So, If a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

[61] Prominent cases in point are Justice Burger and Justice Earl Warren during the American Civil Rights era of the fifties and sixties.

[62] *See generally*, L. Henkin and Albert J. Rosenthal eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press,1990); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Columbia Law Review 537 (1988).

[63] *See, e.g.*, Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press,1998). *Also see* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale Law Journal 1225 (1999).

The U.S. Supreme Court has occasionally resorted to the tools of comparative constitutional law in deciding domestic cases.[64] In recent years a movement has emerged that supports a "globalist" interpretation of domestic constitutional cases by the U.S. Supreme Court.[65] This refers to the invoking of foreign sources of law for deciding questions relating to the U.S. Constitution.[66] The Justices of the U.S. Supreme Court have displayed marked tendencies to either cite foreign sources of law or a refusal to do so. Scholars have also discerned shades of International Relations theory in varying degrees in the opinions of Supreme Court Justices.[67] When Justices cite foreign sources of law in their opinions, they have a two-fold influence on the growth of international law. In the first place, by virtue of the primacy that the Supreme Court enjoys in the political and cultural life of the United States, their openness to foreign sources of law serves to legitimize international law and foreign sources of law within the United States. Secondly, by doing so the Justices are participating in the Transnational Judicial Dialogue which is now a major source of the spread of the rule of law in the international sphere.

Mark Tushnet of the Harvard Law School has pointed out the tension between the forces of globalization that are impelling a degree of convergence regarding basic constitutional principles among various nations and traditional notions of exceptionalism that are resisting such tendencies. According to Tushnet the forces that are driving convergence are transnational judicial networks, international institutions and NGOs, local interests supporting foreign investments, and others.[68]

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[64] *See* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA Law Review 539 (2001).

[65] *See* Ken I. Kersch, *The Globalized Judiciary and the Rule of Law*, The Good Society, Fall 2004. Available at SSRN : http://ssrn.com/abstract=600680.

[66] Some scholars have felt that the U.S. Supreme Court seems to have treated these foreign sources of law as authoritative. *See* Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 Harvard Law Review 31, 85 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harvard Law Review 148, 156 (2005).

[67] See Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 Albany Law Review 771 (2006); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 Washington University Global Studies Law Review 345 (2005).

[68] Mark Tushnet, *The Inevitable Globalization of Constitutional Law*. Hague Institute for the Internationalization of Law; Harvard Public Law Working Paper no. 09-06. Available at SSRN: http://ssrn.com/abstract=1317766

The traditional notion of American Exceptionalism which looms large in the American popular imagination as well as enjoying a large constituency among the intelligentsia, is a countervailing force against the assignment of primacy to international law. An example of this exceptionalism is Seymour Martin Lipset's description of "Americanism":

> Born out of revolution, the United States is a country organized around an ideology which includes a set of dogmas about the nature of a good society. Americanism, as different people have pointed out, is an "ism" or ideology in the same way that communism or fascism or liberalism are isms. As G.K.Chesterton put it: "America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence…." [The American] ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire. The revolutionary ideology which became the American Creed is liberalism in its eighteenth- and nineteenth-century meanings, as distinct from conservative Toryism, statist communitarianism, mercantilism, and noblesse oblige dominant in monarchical, state-church formed cultures.[69]

This notion of exceptionalism is one of the reasons for a continuing ambivalence about international law in the opinions of the United States Supreme Court.[70]

Critics within the United States who oppose the invocation of law as asserted by supranational international institutions and the Court's reliance upon foreign sources of law do so on the grounds that it impinges upon national sovereignty. [71]

Another common source of opposition comes from those who subscribe to the philosophy of "originalism" as the only valid means of constitutional interpretation. On

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[69] Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* 31 (W.W. Norton&Co., 1996).

[70] See Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 Berkeley Journal of International Law (2006).

[71] See, e.g., John R. Bolton, *Should We Take Global Governance Seriously?*, 1 Chicago Journal of International Law 205(2000). According to Bolton, those who support the implementation of rules made by supranational institutions would like to fashion "a network of international agreements and customary international law that effectively takes critical political and legal decisions out of the hands of nation-states by operationally overriding their own internal decision-making processes." *Id.* at 212.

the other hand, proponents of "living constitutionalism" support the use of foreign sources as a means of constitutional interpretation. [72]

Several Justices of the United States Supreme Court have shown a favorable inclination to support the value of partaking in this Transnational Judicial Dialogue. [73]

The recent retirement of one of the Justices of the U.S. Supreme Court and the appointment of a new Justice to fill the vacancy is a matter of much interest to scholars of international law and to jurists in other nations, because the inclination of the new Justice — or the lack thereof — to participate in the Transnational Judicial Dialogue will have a direct bearing on the growth of international law in the years to come.

V. CONCLUSION

Due to the technological revolution and the forces of globalization that are sweeping the world, international law has come to grow radically in its importance and in its sweep. But this rise and growth of all aspects of international law depend for their legitimation on the acceptance and conferring of validity by the domestic courts of the traditional nation-state. The willingness of judges worldwide to partake in the Transnational Judicial Dialogue will have an important bearing upon the growth of the rule of law in the international sphere.

A new appointment to the Supreme Court of the United States raises interesting questions regarding the growth of international law in the United States and thereby in the rest of the world.

By means of the power of Judicial Review, the U.S. Supreme Court has enjoyed a privileged position of power apropos of matters relating to the U.S. Constitution. The stance adopted by the U.S. Supreme Court on legal and political matters has a strong normative influence on the direction of public opinion and in creating a social and cultural environment in which certain ideas and beliefs enjoy a more hospitable reception than others. Internationalization is a concept that is amenable to being shaped and influenced by the opinions of the U.S. Supreme Court.

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[72] *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA Law Review 639, 641, 644 (2005).

[73] *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 Idaho Law Review 1 (2003); Sandra Day O' Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 American Society of International Law Proceedings 348 (2002).

Furthermore, the opinions delivered by the Supreme Court of the United States have a strong influential effect on the laws and judgments of courts in other lands. That is the reason that scholars of international law will be keen to know the predilections of the new Justice relating to transnational law over the coming years.

Through the system of checks and balances the composition of the Judiciary remains under the control of the Executive and the Legislature. However, there have been numerous instances of Justices departing from the ideological positions that they held on matters before their appointment to the apex Court.

Although two ideologically distinct liberal and conservative blocs have emerged in the U.S. Supreme Court in recent years, the inclinations of the Justices in matters relating to the international sphere cannot always be readily gauged from their inclinations on issues relating to the domestic sphere. The traditional ideological divide does not always hold sway in issues that cross the boundaries of nation-states.

What will be of deep interest to scholars of international law and to jurists in other nations is the extent to which the new composition of Justices on the U.S. Supreme Court will be inclined to heed the ramifications of globalization and its effects on the internationalization of law, and whether the majority opinions of the Court in the coming years will tend to promote the expansion of the rule of law in the international sphere.

国際分野における法の支配の範囲の拡大

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要　約

国際法は、伝統的にその中に２つの明らかな副分野が含まれるものとして、理解されてきた。その副分野とは、国際公法と国際私法である。国際公法とは、国家間の関係を司る法のことである。国際私法とは、個人や企業や他の国家でない団体に関する、国際的な性質の法的な疑問を司る法の一部である。国際関係論の「現実主義者」は、その主義に対するメカニズムに欠けているという根拠から、国際法の有効性を否定している。この批判に答えるように、“New Haven School”of International Lawの支持者は、その強制力に対する効果的な機関に欠けていたとしても、国際法が妥当性と合法性を持つようになった過程を研究している。グローバライゼーションの到来は、個人間、国家間、企業間やその他国が関与しない団体間の国家を越えた、多くの相互作用の覚醒をもたらした。このために、国際法の性質はかなり複雑化していっている。「法の支配」というフレーズを使うことが、国内の領域という伝統的な基本から広がり、国際的な領域へと拡大していっている。最近では、様々な国際的フォーラムにおいて取り上げられた、宣言や断言に対する承認が与えられてきている。このように法の支配の概念は、主に国際法、国際関係論、憲法などの様々な原則によって習慣的にカバーされている領域をいまや横断するものとなっている。この論文では、このテーマを理解するのに必要な３つの分野の本質的考えを簡単に述べている。それから、アメリカ合衆国最高裁の意見と、“Transnational Judicial Dialogue”を共にするための、裁判所の裁判官の性質とが国際的領域における法の支配の拡大をもたらしうるという趣旨の説明に至っている。この理由のためにこの論文で述べているのは、その判事の一人の引退と空席を埋めるための新たな判事の任命によって、アメリカ合衆国最高裁に起きた近年の空席は、慣習的な革新派と保守派を分割する以上の問題に関わっているということである。それはアメリカ合衆国、国内の憲法の視点からだけでなく、国際法や国際関係論の視点からしても、関心のある点である。